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IN THE

Supreme Court of the United States

October Term, 1982

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

ROBERT D. WILLETTE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

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Questions Presented

1. Does the interpretation of the New York State Constitution by the New York Court of Appeals in the area of right to counsel where a criminal suspect has a lawyer on a pending unrelated charge offend the Supremacy Clause of the United States Constitution?

2. Does the refusal of the New York courts to permit criminal suspects to exercise their right to self-representation guaranteed by the United States Constitution offend the Supremacy Clause of the federal constitution?

3. Do the holdings of the New York Court of Appeals in the area of right to counsel where a suspect in a criminal case has a lawyer on a pending unrelated charge offend the Ninth and Fourteenth Amendments of the United States Constitution?

TABLE OF CONTENTS

	PAGE
Questions Presented	1
Preliminary Statement	2
The Opinions Below	2
Jurisdiction	2
Constitutional Provisions Involved	3
Statement of the Case	4
The Decisions of the State Courts	6
Reasons for Granting the Writ	7
Question Number One—	
Does the interpretation of the New York State Constitution by the New York Court of Appeals in the area of right to counsel where a criminal suspect has a lawyer on a pending unrelated charge offend the Supremacy Clause of the United States Constitution?	7
Question Number Two—	
Does the refusal of the New York courts to permit criminal suspects to exercise their right to self-representation guaranteed by the United States Constitution offend the Supremacy Clause of the federal constitution?	13

PAGE

Question Number Three—

Do the holdings of the New York Court of Appeals in the area of right to counsel where a suspect in a criminal case has a lawyer on a pending unrelated charge offend the Ninth and Fourteenth Amendments of the United States Constitution? 20

Conclusion 23

Appendices

Appendix A—*Nisi Prius* Opinion 1a

Appendix B—Appellate Division Opinion and Order 31a

Appendix C—Certificate Denying Leave 35a

TABLE OF AUTHORITIES

PAGE

Cases:

Adams v. United States *ex rel. McCann*, 317 U.S. 269 (1942) 13

Bennett v. State of Maryland, 283 Md. 619 (1978) 10

Carter v. Illinois, 329 U.S. 173 (1946) 15
Charles v. Brown, 495 F.Supp. 862 (N.D.Ala. 1980) 20
Chapman v. Crane, 123 U.S. 540 (1887) 14
Clark v. Turner, 283 F.Supp. 909 (D.Utah 1968) 8
Cobbs v. Robinson, 528 F.2d 1331 (2d Cir. 1975), *cert. denied* 424 U.S. 947 (1976) 10
Commonwealth v. Thorne, 234 Pa.Super. 92 (1975) 11
Commonwealth v. Davis, 479 Pa. 274 (1978) 15
Cooper v. Aaron, 358 U.S. 1 (1958) 14

Diamond v. Bland, 11 Cal.3d 331 (1974), *cert. denied* 419 U.S. 885 (1974) 8
Dunaway v. New York, 422 U.S. 200 (1979) 18
Dutil v. State of Washington, 92 Wash.2d 84 (1980) 10

Faretta v. California, 422 U.S. 806 (1975) 13, 14, 18

Griswold v. Connecticut, 381 U.S. 479 (1965) 20

Henry v. Rock Hill, 376 U.S. 776 (1964) 14

Kennedy v. Fairman, 618 F.2d 1242 (7th Cir.), *cert. denied* 449 U.S. 939 (1980) 10
Kruidenier v. McCulloch, 258 Ia. 1121 (1966), *cert. denied* 385 U.S. 851 (1967) 8

Manousos v. Sarkis, —— Mass. ——, 416 N.E.2d 179 (1981) 9
Miller v. State of Tennessee, 584 S.W.2d 758 (Tenn. 1979) 9

PAGE

Nash v. Estelle, 597 F.2d 513 (5th Cir. 1979) 10
North Carolina v. Butler, 441 U.S. 369 (1979) 14, 19

Opinion of the Justices, 370 A.2d 198 (Me. 1973) 8
Oregon v. Haas, 420 U.S. 714 (1975) 8, 14

People v. Bartolomeo, 53 N.Y.2d 225 (1981) 6, 11, 13, 23
People v. Booker, 69 Cal.App.3d 654 (2d Dist. 1977) 11
People v. Davis, 49 N.Y.2d 114 (1979) 11, 15
People *ex rel.* Scott v. Schwulst Building Center, Inc., 92 Ill.App.3d 552 (1981) 9–10
People v. Huntley, 15 N.Y.2d 72 (1965) 19
People v. Mack, 89 Cal.App.3d 974 (2d Dist. 1979) 11
People v. Morgan, 40 Ill.App.3d 711 (5th Dist. 1976) 11
People v. Ponder, 54 N.Y.2d 160 (1981) 12
People v. Rogers, 48 N.Y.2d 167 (1979) 6, 11, 13, 23
People v. Teresinski, 30 Cal.3d 822 (1982) 10
Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) 12

Reynolds v. Sims, 377 U.S. 533, 584 (1964) 8
Roe v. Wade, 410 U.S. 113, 153 (1973) 22

State v. Davis, 582 S.W.2d 342 (Mo.App.1979) 11
State v. Gretzler, 12 Ariz. 60 (1980) 11
State of Hawaii v. Kaluna, 55 Haw. 361 (1974) 9
State of Hawaii v. Miyasaki, 62 Haw. 269 (1980) 9
State v. Richmond, 114 Ariz. 186 (1976) 11
State v. Sahlie, 277 N.W.2d 591 (S.Dak. 1979) 11
State of Tennessee *ex rel.* Peel v. Shelby County, 564 S.W.3d 371 (Tenn. 1976), *cert. denied* 434 U.S. 978 (1977) 8
Stone v. State of Florida, 378 So.2d 768 (Fla. 1979) 11

The Kroger Co. v. O'Hara Township, 481 Pa. 101 (1978) 10

PAGE

United States v. Brown, 569 F.2d 236 (5th Cir. 1978) 11
United States v. Cook, 311 F.Supp. 618 (W.D.Pa.1970) 20
United States v. Diamond, 492 F.Supp. 583 (D.Md. 1980) 11
United States v. Dority, 487 F.2d 846 (6th Cir. 1973).. 11
United States v. Grant, 549 F.2d 942 (4th Cir. 1977), *cert. denied* 432 U.S. 908 (1977) 10
United States v. Mohabir, 624 F.2d 1140 (2d Cir. 1980) 10, 18
United States v. VanDusen, 431 F.2d 1278 (1st Cir. 1970) 11
United States v. Woods, 613 F.2d 629 (6th Cir.), *cert. denied* 446 U.S. 920 (1980) 11

White v. Finkbeiner, 611 F.2d 186 (7th Cir. 1979) (*en banc*), *cert. denied* 451 U.S. 1031 (1981) 10

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The petitioner, the People of the State of New York, respectfully prays that a writ of certiorari issue to review the order and opinion of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, entered in this proceeding on March 22, 1982.

Preliminary Statement

Pursuant to a judgment of the Supreme Court of the State of New York, County of Suffolk, the respondent Robert Willette was convicted, following entry of a plea of guilty, of manslaughter in the first degree, and he was sentenced to an indeterminate term of incarceration of zero to twelve years.

The Opinions Below

At the conclusion of a suppression hearing conducted pursuant to a motion by the defendants, the *nisi prius* court, in an oral opinion read into the record, denied the motion to suppress in all respects. The opinion is not reported, and is annexed hereto as Appendix "A". The opinion of the Appellate Division, Second Judicial Department, which reversed the judgment of conviction and vacated the plea, is reported at 87 A.D.2d 642, 448 N.Y.S.2d 210 (2d Dep't 1982), and is annexed hereto as Appendix "B". The certificate of the Court of Appeals of the State of New York, per Hon. Sol Wachtler, Associate Judge, dated May 27, 1982, denying leave to appeal to that court, is annexed hereto as Appendix "C".

Jurisdiction

The petitioner seeks certiorari to review an order of the Supreme Court of the State of New York, Appellate Division, Second Department, dated March 22, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1257(3). The certificate of the New York Court of Appeals denying leave is dated May 27, 1982.

Constitutional Provisions Involved

Article VI, Clause 2 of the United States Constitution:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."

The Sixth Amendment of the United States Constitution which provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

The Ninth Amendment of the United States Constitution:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the People."

The Fourteenth Amendment of the United States Constitution:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, Section 6 of the New York State Constitution which provides, in pertinent part,

> "In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions."

Statement of the Case

The respondent was indicted, together with co-defendants Ronald Kolb and Glen Wagner,[1] for murder in the second degree, robbery in the second degree, burglary in the first degree, and conspiracy in the second degree. According to the prosecution's theory of the case, on March 13, 1975, the defendants, pursuant to their agreement and plan, entered the home of Thomas Henderson in Blue Point, New York, stole various items of electronic and audio equipment from him and beat him to death with a baseball bat.

There was a fourth participant in the murder, Robert Gribbins.[2] The investigation turned up no leads for over three years. Then, in May 1978, Gribbins was arrested for a burglary (in which, incidentally, he also implicated the respondent). In return for some consideration for his own problems, Gribbins agreed to cooperate with the police in solving the Henderson murder. Accordingly, the police

1. Kolb and Wagner chose to go to trial. They were found guilty of murder in the second degree, burglary in the second degree, and conspiracy in the second degree. Each received three concurrent terms of imprisonment, the longest of which was twenty-five years to life. They are presently incarcerated, and, although each has filed a notice of appeal, neither one has perfected it.

2. There was, in fact, a fifth—Ronald Kolb's brother, Kevin Kolb. However, Kevin died before the crime was solved, and Gribbins was not indicted because of his cooperation with the police.

wired Gribbins with electronic recording equipment, and he engaged in a conversation with the respondent and Candy Norton, respondent's girlfriend, in which the police surveillance team overheard the respondent incriminate himself in the Henderson murder. On the basis of that conversation, the police arrested the respondent and brought him and Candy Norton to police headquarters. After first obtaining incriminating statements from Candy Norton, the police confronted the respondent with her statements, as well as respondent's own statements made to Gribbins. The respondent then admitted some limited participation in the murder, and he implicated Kolb and Wagner. He also agreed to cooperate with the police in the same fashion that Gribbins was doing. Accordingly, the respondent engaged in a recorded conversation with Wagner, and Gribbins did the same with Kolb, which formed the basis of the arrest of the two co-defendants, both of whom likewise confessed to the murder. This scenario was played out over the course of three days on September 12, 13 and 14, 1978.

All three defendants moved to suppress their statements, and a five-day joint hearing was held in June 1979. The respondent claimed that his statements were beaten out of him; that they were obtained in violation of his right to counsel; and that they were induced by an unconditional promise that he would not be incarcerated. The hearing court denied all defense motions. Interestingly, as it will be explained below, none of these issues was determinative in the state court appeal.

The following portions of the suppression hearing subsequently proved to be the crucial ones. The respondent gave an oral confession to the two police officers who were

questioning him, and, shortly thereafter, a written confession to an Assistant District Attorney who was called to speak with him. Both the police and the prosecutor knew that the respondent had a lawyer on a pending unrelated criminal charge. In fact, the hearing court so stated in its factual findings. However, under the law of New York at that time, the fact that a criminal suspect had a lawyer on a pending unrelated charge did not in any way implicate his right to counsel as to the subject crime for which he is being questioned. Thus, that fact was not reason for the hearing court to grant suppression.

The Decisions of the State Courts

The suppression hearing in the *nisi prius* court was was held in June 1979 and the judge rendered his decision on September 15, 1979. Subsequently, on October 23, 1979, the New York Court of Appeals rendered its decision in *People* v. *Rogers* (48 N.Y.2d 167), holding that when a criminal suspect is represented by an attorney on a pending unrelated charge, his right to counsel attaches under the New York Constitution, and he may not waive that right except in the presence of counsel. Thus, although the hearing court properly denied the suppression motions under the then existing law, by the time this case was argued in the Appellate Division, *People* v. *Rogers* was the law in New York, thus requiring reversal of the conviction,[3] solely on this issue. The federal constitutional questions raised in the instant petition were argued by the prosecution in

3. *Rogers* has been applied retroactively in New York. Moreover, in *People* v. *Bartolomeo* (53 N.Y.2d 225 [1981]), the New York Court of Appeals extended *Rogers* to situations where the interrogating officers do not even know of a suspect's representation on another charge, but they have reason to know.

the Appellate Division, but were not addressed in that court's opinion. The New York Court of Appeals declined to entertain further appeal.

Reasons for Granting the Writ

QUESTION NUMBER ONE

Does the interpretation of the New York State Constitution by the New York Court of Appeals in the area of right to counsel where a criminal suspect has a lawyer on a pending unrelated charge offend the Supremacy Clause of the United States Constitution?

Art. VI, Clause 2 of the United States Constitution reads as follows:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."

The Sixth Amendment of the Constitution reads, in pertinent part, as follows:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

The relevant portion of Art. I, Sec. 6 of the New York Constitution reads as follows:

> "In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions."

Thus, the federal constitution and the New York constitution are textually virtually identical with respect to right

to counsel. In fact, the state constitution purports to be even more restrictive, in providing specifically that the right attaches only "in any trial". While it is true that, as a general rule, a state may afford suspects in criminal cases broader rights under its state constitution than the United States Supreme Court has deemed necessary under the federal constitution (*Oregon* v. *Haas*, 420 U.S. 714 [1975]), where the relevant texts of the two constitutions are virtually identical, the state court should not be permitted to give that text an interpretation perversely contrary to the interpretation of the same text by the Supreme Court. To allow state courts to do so would make a mockery of the Supremacy Clause of the federal constitution. If a state seeks to create such a broader panoply of rights for suspected criminals, it should be done through an amendment to the state constitution, after proper hearings at which the citizens of the state can present their views to the legislators they elected.

It is, of course, beyond dispute that "when there is an unavoidable conflict between the Federal and a State Constitution, the Supremacy Clause of course controls" (*Reynolds* v. *Sims*, 377 U.S. 533, 584 [1964]). This has been the unopposed view in both the state courts (see, *e.g.*, *State of Tennessee ex rel. Peel* v. *Shelby County*, 564 S.W.3d 371 [Tenn. 1976], *cert. denied* 434 U.S. 978 [1977]; *Diamond* v. *Bland*, 11 Cal.3d 331 [1974], *cert. denied* 419 U.S. 885 [1974]; *Opinion of the Justices*, 370 A.2d 198 [Me. 1973]; and *Kruidenier* v. *McCulloch*, 258 Ia. 1121 [1966], *cert. denied* 386 U.S. 851 [1967]), as well as in the federal courts (see *Clark* v. *Turner*, 283 F.Supp. 909 [D.Utah 1968]).

Whether or not state courts have unlimited authority to ignore textual identity between the federal and a state con-

stitution and to interpret the state constitution radically at variance with the opinions of our highest Court is a question in search of an answer. For example, although the highest courts of two states have purported to so authorize themselves (*Miller* v. *State of Tennessee*, 584 S.W.2d 758 [Tenn. 1979] and *State of Hawaii* v. *Kaluna*, 55 Haw. 361 [1974]), other high court decisions in the same two states have held precisely the opposite. In *In the Matter of the Petition for Rule of Court Governing Lawyer Advertising* (564 S.W.2d 638 [Tenn. 1978]), the Tennessee Supreme Court stated explicitly:

> "It is fundamental to the law that where this Court's interpretation or application of a provision of our State Constitution conflicts with the Supreme Court's interpretation of an analogous provision of the Federal Constitution, the State Constitution must yield under the Supremacy Clause" (*Id.* at 642).

Similarly, in *State of Hawaii* v. *Miyasaka* (62 Haw. 269 [1980]), the Hawaii Supreme Court traced in fine detail the balancing of interpretations between state and federal constitutions where there are textually identical provisions. The state court, it was held, is bound in such cases to accord great deference to the holdings of the United States Supreme Court; thus, while the state court, in interpreting its own constitution, is not absolutely bound to follow the high Court's rulings to the last jot, the state court is certainly not free to disregard those rulings and to flaunt the supremacy of the high Court by developing interpretations that have no logical relationship whatsoever to what the Supreme Court has said. Other states have adopted this reasonably restrictive view (see, *e.g.*, *Manousos* v. *Sarkis*, —— Mass. ——, 416 N.E.2d 179 [1981]; *People ex rel. Scott*

v. *Schwulst Building Center, Inc.*, 92 Ill.App.3d 552 [1981];[4] *People* v. *Teresinski*, 30 Cal.3d 822 [1982]; *Dutil* v. *State of Washington*, 92 Wash.2d 84 [1980]; *The Kroger Co.* v. *O'Hara Township*, 481 Pa. 101 [1978]; and *Bennett* v. *State of Maryland*, 283 Md. 619 [1978]).

It bears emphasis that the New York Court of Appeals has accorded to suspected criminals a right to counsel far broader than those deemed necessary by the Supreme Court under the textually analogous provisions of the federal constitution. Under federal law, the event that triggers the attachment of indelibility with respect to right to counsel —that is, the point after which a suspect may not waive counsel in the absence of counsel—is the actual entry of an attorney into that case. Thus, in the federal system, a suspected criminal may waive his right to counsel in the absence of counsel even after indictment and even after he has actually requested an attorney (see, *e.g.*, *White* v. *Finkbeiner*, 611 F.2d 186 [7th Cir. 1979] [en banc], *cert. denied* 436 U.S. 919 [1978]; *United States* v. *Mohabir*, 624 F.2d 1140 [2d Cir. 1980]; *Nash* v. *Estelle*, 597 F.2d 513 [5th Cir. 1979]; *United States* v. *Grant*, 549 F.2d 942 [4th Cir. 1977], *cert. denied* 432 U.S. 908 [1977]; *Cobbs* v. *Robinson*, 528 F.2d 1331 [2d Cir. 1975], *cert. denied* 424 U.S. 947 [1976]; *Kennedy* v. *Fairman*, 618 F.2d 1248 [7th Cir. 1978], *cert. denied* 441 U.S. 947 [1979]).

Most assuredly, the federal courts have not seen fit to attach the right to counsel indelibly where the suspect does not have a lawyer, has not asked for a lawyer, has spe-

4. Although the Illinois Supreme Court reversed (89 Ill.2d 365 [1982], it approved the lower court's rationale, concluding, however, that the language of the two constitutions was not the same in meaning.

cifically stated that he does not want a lawyer, and has specifically declined to tell the police that he has a lawyer on another charge.[5] For example, in *United States* v. *Woods* (612 F.2d 629 [6th Cir.], *cert. denied* —— U.S. ——, 100 S.Ct. 1856 [1980]), federal authorities interviewed a prisoner who was in state custody and represented by counsel on pending state charges. Nonetheless, the suspect's waiver of right to counsel as to the federal charges was sustained. To the same effect was the decision in *United States* v. *Brown* (569 F.2d 236 [5th Cir. 1978]).

It has also been held in the federal courts that questioning a suspect and eliciting statements even though the suspect is represented by a lawyer on a pending unrelated charge does not necessarily make the statements inadmissible, even in the absence of a suspect's legal representation (*United States* v. *Dority*, 487 F.2d 846 [2d Cir. 1973]; and *United States* v. *VanDusen*, 431 F.2d 1278 [1st Cir. 1970]). Stated another way, uncounseled statements taken from a defendant while he is under indictment and represented by counsel can be used at any trial other than the trial of that indictment (*United States* v. *Diamond*, 492 F.Supp. 583 [D.Md. 1980]).

As indicated above, the petitioner does not dispute the right of a state to extend rights to suspected criminals

5. Moreover, the following representative sampling of sister state cases also teaches that the *Rogers/Bartolomeo* rationale has not been adopted in any other jurisdiction: (*State* v. *Gretzler*, 12 Ariz. 60 [1980]; *Stone* v. *State*, 378 So.2d 768 [Fla. 1979]; *State* v. *Sahlie*, 277 N.W.2d 591 [S.Dak. 1979]; *Jackson* v. *State*, 268 Ind. 360 [1978]; *State* v. *Richmond*, 114 Ariz. 186 [1976]; *People* v. *Mack*, 89 Cal.App.3d 974 [2d Dist. 1979]; *State* v. *Davis*, 582 S.W.2d 342 [Mo.App. 1979]; *People* v. *Booker*, 69 Cal.App.3d 654 [2d Dist. 1977]; *People* v. *Morgan*, 40 Ill.App.3d 711 [5th Dist. 1976]; and *Commonwealth* v. *Thorne*, 234 Pa.Super. 92 [1975]).

beyond those declared necessary under the federal constitution. However, that freedom on the part of a state court should be limited where the relevant provisions of the state and federal constitutions are textually identical. Such clear similarity in language indicates the legislative intent of the constitutional drafters that the two documents are to be interpreted in a similar fashion. In other words, where the draftsmen of the United States Constitution, which postdated the New York Constitution, have expressly spelled out that the law of the land on right to counsel as interpreted by the Supreme Court under the federal constitution, shall be at least conceptually in conformity with the law under the state constitutions from which the federal was borrowed, a state court that engrafts upon its state constitution an interpretation radically at variance with the Supreme Court's perception of the very same language violates the federal Supremacy Clause. If a state wishes to confer, under its constitution, rights substantially beyond those deemed necessary and appropriate by the draftsmen of the federal constitution, the proper way to do so should be an amendment to the state constitution. This view finds support not only in logic but in the language of the Supreme Court itself in its most recent pronouncement in this regard. In *Pruneyard Shopping Center* v. *Robins* (447 U.S. 74 [1980]), the Court reiterated "the authority of the State to exercise its police power or its sovereign right *to adopt in its own constitution* individual liberties more expansive than those conferred by the Federal Constitution" (Emphasis added) (*Id.* at 81). Interestingly, the best possible state authority for the position the petitioner urges here was provided quite recently by the New York Court of Appeals itself. In *People* v. *Ponder* (54 N.Y.2d 160 [1981]), in a Fourth Amendment context, New York abol-

ished the "automatic standing" rule under its state constitution, precisely because the United States Supreme Court had abolished the rule under the Federal Constitution. Wrote the court:

> "Article I, section 12 of the New York State Constitution conforms with the Fourth Amendment regarding the proscription against unreasonable searches and seizures, and this identity of language supports a policy of uniformity in both State and Federal courts." (*Id.* at 165).

QUESTION NUMBER TWO

Does the refusal of the New York courts to permit criminal suspects to exercise their right to self-representation guaranteed by the United States Constitution offend the Supremacy Clause of the federal constitution?

The Sixth Amendment of the United States Constitution guarantees an individual the right to proceed *pro se* at all critical stages of the prosecution (*Faretta* v. *California*, 422 U.S. 806 [1975]; *Carter* v. *Illinois*, 329 U.S. 173 [1946]; and *Adams* v. *United States ex rel. McCann*, 317 U.S. 269 [1942]). This federal right has been made binding on the states through the Fourteenth Amendment, and thus no state may force a lawyer upon an unwilling defendant (*Faretta* v. *California, supra*). *People* v. *Rogers* (48 N.Y. 2d 167 [1979]) and *People* v. *Bartolomeo* (53 N.Y.2d 225 [1981]), in interpreting Article I, Sec. 6 of the New York Constitution, New York's right to counsel provision, does just that with respect to custodial interrogation, a critical stage of the proceedings; in essence, once an individual has retained counsel for an unrelated purpose, he becomes

imprisoned in his constitutional privileges. As a result, the rule of *Rogers* and *Bartolomeo* conflicts with and undermines a federally protected constitutional right. Since the federal constitution is supreme, these decisions must be overruled pursuant to the Supremacy Clause of the federal constitution (*Cooper* v. *Aarson*, 358 U.S. 1 [1958]; and *Henry* v. *Rock Hill*, 376 U.S. 776 [1964].[6]

The Supreme Court in *Faretta* held that an accused enjoys the constitutional right to self-representation with respect to his own case: "Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his case . . . counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'" (*Faretta* v. *California*, *supra*, at 834).

In this respect, other courts have recognized and applied logically the constitutional right to self-representation at

6. With respect to the question of standing, while the right to self-representation is personal, the petitioner here is not asserting respondent's constitutional rights. Rather, we are asserting our standing to attack the federal constitutional validity of New York's *per se* rule because pursuant to this rule, the petitioner is an adversely affected party litigant. It is well settled that the constitutionality of a ruling may be asserted only by a litigant who is adversely affected by that ruling. In this case, the right of the People, a party litigant, to introduce otherwise competent, reliable evidence of guilt may be denied as a result of New York's *per se* rule. Thus, the petitioner has standing to raise the question of the federal constitutionality of New York's *per se* rule (*Oregon* v. *Haas*, 420 U.S. 714 [1975]; and *Chapman* v. *Crane*, 123 U.S. 540 [1887]; *cf. Fare* v. *C.*, 442 U.S. 707 [1979]; and *North Carolina* v. *Butler*, 441 U.S. 369 [1979]).

custodial interrogation, respecting the inestimable worth of free choice as guaranteed by the Bill of Rights. Thus courts have eschewed New York's *per se* no questioning rule once an accused is in custody, even where he requests counsel, recognizing that he has a constitutional right to change his mind and proceed without counsel with respect to station house questioning. In *Commonwealth* v. *Davis* (479 Pa. 274 [1978]), the Supreme Court of that state wrote, albeit as dictum:

> "If a criminal defendant in a state trial has the right under the Federal Constitution to waive the assistance of counsel, this right may not be curtailed by the provisions of the Pennsylvania Constitution." (*Id.* at 275, fn. 3).

As stated in *Carter* v. *Illinois* (329 U.S. 173, 174-75 [1946]): "Neither the historic conception of due process nor the validity it derives from progressive standards of justice denies a person the right . . . to confess guilt. . . . The [federal] constitution does not require that under all circumstances, counsel be forced upon a defendant". In this regard, *Faretta* emphasizes that the constitutional right to self-representation is paramount, while the right to the assistance of counsel is supplemental, with regard to a criminal proceeding. Indeed, New York in *People* v. *Davis* (49 N.Y.2d 114 [1979]) recognized the paramount right to self-representation with respect to trial, citing *Faretta*. To this end, respectfully, we cannot conceive of a more critical stage of the proceeding than the trial itself. Why counsel in New York never requested and unequivocally waived must be thrust upon an unwilling individual defies reason and logic.

In *Bartolomeo,* the dissenting opinion of Judge Sol Wachtler emphatically pinpointed the illogic of paternalistically thrusting unwanted counsel on a suspect in custody:

> "A defendant who commits a crime while out on bail should not be immune from questioning by police with respect to his latest criminal acts. Such a rule would be a benefit to the repeat offender and an obstacle to law enforcement." (*Id.* at 236).
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> "[N]either of these principles requires the conclusion that a person who has once been arrested on a charge, however minor, upon which counsel has either entered the picture actually or constructively, must be insulated from uncounseled police interrogation. Such a conclusion, in addition to not being analytically required, serves to extend prior cases beyond their intended scope, create injustice, and benefit those who are frequently arrested.
>
> It has never been held, nor does basic fairness require, that all police interrogations will always, and in all circumstances, take place in the presence of counsel. *Implicit in this is a recognition that a defendant in most instances is capable of deciding for his own reasons whether he is in need of or desires such assistance. Also implicit is that there is no need for the paternalistic view that the police should assure the assertion of a defendant's right to counsel, despite his own expressed wishes to the contrary.*" (Emphasis added). (*Id.* at 237-38).
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> "Where the defendant has in no way, despite an expressed opportunity to do so, sought the advice of counsel in connection with a particular custodial event or on a particular charge . . . there is simply no indication of a defendant's inability to deal with the po-

lice, and if he chooses to do so there is no inherent evil in permitting the defendant to proceed in the absence of an attorney." (*Id.* at 238).

• • •

"But logic does not support the assumption that because a defendant has a right to counsel in the critical stages of one proceeding, an equally critical phase has been reached in all other unrelated investigations. For this reason, it is not material that the police in this case knew of a prior arrest of the defendant on which his right to counsel might have attached.

It also does not necessarily follow that the knowledge of the police of defendant's arrest is the equivalent of knowledge that he actually was represented by counsel. Beyond this, there certainly is no reason to assume on these facts that if there was counsel, that counsel would have become involved in a subsequent unrelated investigation, particularly in view of defendant's assertion that he wishes to proceed without the assistance of counsel.

Nevertheless, the majority contends that the police were bound to make affirmative inquiries into the possibility that defendant might in some manner have been represented by counsel. However, neither the Federal courts, nor this court on any previous occasion has ever suggested the constitutional necessity for what must be recognized as a new addition to the litany of Miranda warnings. It is already the law that a suspect must be clearly told he may refuse to say anything in the absence of his attorney. To say that the police must do more than this carries the right to counsel to unheard of extremes.

It is the common criminal, not the one-time offender, who nearly always will manage to have at least one serious charge pending, so that the attorney in the picture can provide him with virtual immunity from

> questioning in subsequent investigations. I had thought it clear that although our courts are sometimes required to let the guilty go free, this is not because the Constitution serves only the miscreant, but rather because our constitutional protections must apply evenly to us all. By its analysis I believe the majority has turned this basic principle completely around by providing what is in effect a dispensation for the persistent offender." (*Id.* at 238-39).

Indeed, in *United States* v. *Mohabir* (624 F.2d 1140 [2d Cir. 1980]), the Second Circuit observed presciently that the New York law may well be in conflict with the individual's constitutional right to self-representation:

> "We put off until another day consideration of the third alternative suggested above, that of simply outlawing all statements following uncounseled waivers by indicted defendants. Such a course would be the most drastic of the three, and might run counter to the policy that a defendant constitutionally can insist upon proceeding without counsel even though he has been fully advised of the folly of doing so. See *Faretta* v. *California, supra.*" (*Id.* at 1153).

While the state may afford the accused more federal constitutional protection than the Supreme Court devises, it cannot dilute federal protections and provide less (*Dunaway* v. *New York*, 422 U.S. 200 [1979]). Moreover, while the state can impose greater restrictions on the police, they cannot do so at the expense of guaranteed federal constitutional liberties. "By creating an inflexible rule that no . . . waiver can ever suffice, [New York] has gone beyond the requirements of federal organic law. It follows that its judgment cannot stand, since a state court can neither add to nor subtract from the mandates of the United States

Constitution." (*North Carolina* v. *Butler*, 441 U.S. 369, 376 [1979]).

As we have demonstrated, the New York courts have encroached and trampled upon the recognized federal constitutional right of self-representation and free choice with respect to station house questioning, which is personal to the accused, by subordinating that precious fundamental right to the supplemental right to counsel, where the accused has made an informed choice to dispense with counsel who is not present or in the case and speak with the police on his own. New York has accomplished this by preordaining the imposition of the exclusionary rule, thus deterring law enforcement from speaking with the accused once he has counsel on any unrelated charge.

Finally, overruling *Rogers* and *Bartolomeo* will not denigrate the right to counsel; left intact is the burden of the state to prove beyond a reasonable doubt that the waiver of fifth and sixth Amendment rights with regard to a statement was knowing, intelligent and voluntary (*People* v. *Huntley*, 15 N.Y.2d 72 [1965]). And like *Faretta*, those entrusted with making that determination are the courts, not the police or the prosecution.

QUESTION NUMBER THREE

Do the holdings of the New York Court of Appeals in the area of right to counsel where a suspect in a criminal case has a lawyer on a pending unrelated charge offend the Ninth and Fourteenth Amendments of the United States Constitution?

The Ninth Amendment of the United States Constitution provides: "The enumeration in the constitution, of certain rights, shall not be construed to deny or disparage others retained by the People." The purpose of this Amendment is to guarantee to the People those rights inherent to citizenship in a democracy which are not specifically enumerated in the Bill of Rights (*Griswold* v. *Connecticut*, 381 U.S. 479, 488-89, 490-91 [1965] [Goldberg, J., concurring]; *United States* v. *Cook*, 311 F.Supp. 618 [W.D. Pa. 1970]). Stated another way, the Ninth Amendment was added to the Bill of Rights to ensure that the maxim *expressio unius est exclusio alterius* would not be used at a later time to deny fundamental rights merely because they were not specifically enumerated in the Constitution (*Charles* v. *Brown*, 459 F.Supp. 862 [N.D.Ala. 1980]). It is respectfully submitted that this Amendment is broad enough in scope to encompass a right to personal safety on behalf of the People of the State of New York.

Justice Goldberg, with whom Justice Brennan and the then Chief Justice Warren joined, discussed the Ninth Amendment at length in his concurring opinion in *Griswold*. He first emphasized at 488-89:

> "The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed

that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments . . .

[The Amendment] was proffered to quiet expressed fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected."

Continuing, Justice Goldberg explained at 490-91:

"While this Court has had little occasion to interpret the Ninth Amendment, '[i]t cannot be presumed that any clause in the constitution is intended to be without effect.' In interpreting the Constitution, 'real effect should be given to all the words it uses.' The Ninth Amendment to the Constitution may be regarded by some as a recent discovery and may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we are sworn to uphold. To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and give it no effect whatsoever. Moreover, a judicial construction that this fundamental right is not protected by the constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment . . ."

Justice Goldberg added at 493-94:

"In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the traditional and [collective] conscience of

> our people to determine whether a principle is so rooted [there] . . . as to be ranked as fundamental. The inquiry is whether a right involved is of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. Liberty also gains content from the emanations of . . . specific [constitutional] guarantees and from experience with the requirements of a free society."

Relying in part upon this discussion of the importance of the Ninth Amendment by Justice Goldberg, a majority of the Court in *Roe* v. *Wade* (410 U.S. 113, 153 [1973]) stated: "This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether to determine her pregnancy." This recognizes that people, and not only states, have rights under the Ninth Amendment.

As stated in 9 N.Y. Jur. *Constitutional Law*, Sec. 225: "It has been said that, of all rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security." This right, whether emanating directly from the Ninth Amendment or perhaps even pre-existing the United States Constitution and New York State Constitution, is certainly broad enough to cover the right of the public to be protected from criminals who freely and voluntarily admit to police the commission of a felony. Allowing criminals to go free after guilt has been established beyond a reasonable doubt en-

dangers the law abiding members of society and removes any possible deterrent that punishment for crimes may have. This not only endangers public safety and makes a mockery of justice, but it also absolutely frustrates police in their attempt to fulfill their investigatory duties.

The petitioner respectfully offers that because *People* v. *Rogers* and *People* v. *Bartolomeo* contravene the Ninth Amendment right of public safety for the citizens of New York State, they must be declared invalid under the federal constitution.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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